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Tax Increment Financing: Public Use or Private Abuse?

Alyson Tomme

Note

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In January 2000, Best Buy Co. (Best Buy) announced it was locating its headquarters in Richfield, Minnesota, a move that would consolidate the company's various offices into one 1.5-million-square-foot complex and result in employment for 5,500 people.[1] Best Buy selected Richfield after the city enticed the company with a financing strategy called tax increment financing (TIF).[2] Richfield had been losing its property tax base due to recent funding cuts and a freeway expansion. Wooing Best Buy generated approximately $7 million in annual property taxes, a stark increase from the $700,000 produced in the area at that the time.[3]

Under the deal between Best Buy and Richfield, the city was responsible for condemning all private property in the forty-three acre redevelopment[4] area using its power of eminent domain.[5] To qualify for TIF, the current buildings in the proposed redevelopment area first had to be found structurally

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1. Best Buy Virtual Press Room, *Study Finds Richfield Will Benefit as Site of New Best Buy Headquarters*, June 21, 2000, http://64.45.49.154/bbyvpr/nr20000621-3.asp.

2. *See* Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391, 393 (Minn. Ct. App. 2002), *aff'd* 644 N.W.2d 425 (Minn. 2002).

3. Best Buy Virtual Press Room, *supra* note 1; *see also* THE INT'L ECON. DEV. COUNCIL, EMINENT DOMAIN RESOURCE KIT 24 (2005), http://www.iedconline.org/Downloads/Eminent_Domain_Kit.pdf.

4. THE INT'L ECON. DEV. COUNCIL , *supra* note 3, at 23.

5. *See* Hous. & Red. Auth. v. Walser Auto Sales, Inc., 641 N.W.2d 885, 887 (Minn. 2002).

substandard;[6] the city concluded that 91 percent of the buildings could be so defined based on insulation not in conformance with new construction standards set forth in the Minnesota Energy Code, and thereafter condemned several homes and businesses.[7]

One affected business owner, Paul Walser, objected to the condemnations.[8] According to the city, his automobile dealership qualified for condemnation because it raised traffic noise and safety concerns and was incompatible with nearby residences.[9] He filed suit alleging that the TIF district did not serve a public use when the city was taking the private property only to give it to a private entity.[10] In the end, the Minnesota Court of Appeals found that Richfield had not followed all legal requirements necessary in setting up the redevelopment area,[11] and in order to continue with its plan, Richfield settled with Walser.[12] Today, Best Buy corporate headquarters stand in the disputed location, which continues as a TIF district.

Tax increment financing is attractive to municipalities like Richfield because it has become increasingly difficult to initiate creative public financing techniques.[13] With TIF, local government authorities will designate an area as a TIF district and freeze the tax base at a given year's level.[14] The TIF development should generate additional tax revenue above this set base line, which will then finance the TIF project[15] and eliminate the need to increase taxes.[16]

6. Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d at 394.

7. *Id.* at 394–95. Eighty percent of these determinations were made without interior inspections. *Id.* at 394.

8. Hous. & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662, 665 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

9. *Id.* at 668–69.

10. *See* Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d at 399–400.

11. *See id.* at 402–03.

12. *Walser, Richfield Settle*, BUS. J. (Minneapolis/St. Paul), Mar. 14, 2003, at 12.

13. J. Drew Klacik & Samuel Nunn, *A Primer on Tax Increment Financing*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT 15, 15 (Craig L. Johnson & Joyce Y. Man eds., 2001).

14. *Id.* at 22.

15. *Id.* at 16.

16. *See infra* notes 22–23, 27–29 and accompanying text.

It sounds simple enough. TIF, however, is often used in conjunction with the power of eminent domain, and frequently results in private entities developing the TIF projects.[17] The United States Constitution and most state constitutions mandate that private property may only be taken for public use and with just compensation.[18] Thus, to utilize TIF and develop private property, often the government must first show a valid public use before condemnation can occur. When a city condemns private property for a TIF development only to turn it over to a private developer, the government action becomes suspect and raises constitutional and public policy issues.

Despite these concerns, using TIF for economic development projects recently became much easier. In June 2005, the United States Supreme Court, deciding *Kelo v. City of New London*, effectively expanded the meaning of public use by holding that a generalized economic benefit was a sufficient public use when the government took property and then gave it to a private developer.[19] Broad concepts of public use to satisfy eminent domain, such as that found in *Kelo*, are vital to the continued use of TIF.

This Note asserts that the United States Supreme Court erred in the *Kelo* decision and that TIF is in need of reform if it is to comply with eminent domain principles. This Note explains how TIF first developed along with urban redevelopment and slum clearance statutes, but today has evolved into an all-encompassing financing method for local governments and private developers. Finally this Note explores the intersection of TIF and public use interpretation and jurisprudence. Part I of this Note outlines the history of TIF and its current use, procedures, and statutory standards. Part II describes how the application of public use in TIF projects has evolved from a narrow to an expansive use and summarizes the recent Supreme Court decision in *Kelo v. City of New London*. With this background, Part III scrutinizes the failings of current TIF standards and projects. Part IV suggests TIF reforms through implementing tighter statutory standards and stricter limitations on private developers. In sum, this Note finds that TIF can be

17. Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 555–59 (2002).

18. *See, e.g.*, U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation."); MINN. CONST. art. I, § 13.

19. 125 S. Ct. 2655, 2665–66 (2005).

an effective public financing tool, but its current use is too lenient and provides no accountability when public monies may be given to private entities.[20] Ultimately, this Note urges states to return TIF to its original function.

I. AN OVERVIEW OF TAX INCREMENT FINANCING

A. THE BASICS: HOW TIF WORKS

Tax increment financing's central premise is that when a municipality undertakes a development project, it can expect that the property value of the development site and neighboring properties will increase.[21] TIF enables a municipality to use additional future tax revenues generated by a current development project to finance the current development project itself.[22] In this way, TIF projects are self-financing. Local governmental officials do not have to impose a new tax or a higher tax rate, but instead reallocate new tax revenues from the TIF district to pay for development costs.[23]

TIF policies are first implemented through creation of TIF districts, which are special taxing districts.[24] A TIF district typically shares boundaries with a governing municipality or may be a small section of the city itself.[25] Once established, a redevelopment authority governs the district and has the power to enter into contractual agreements and sell TIF debt.[26]

Once the TIF plan is adopted, the municipality will freeze the property tax base of the proposed project or contiguous ar-

20. Although this Note refers to public money being spent in regards to a TIF project, public funds are not being expended per se. Rather, TIF reduces the tax revenue generated in a given district. Use of TIF freezes the tax base of the TIF district and then uses any tax money collected above that baseline for financing the TIF project. Thus, in effect, public funds are used. For more discussion on the basic workings of TIF, *see infra* notes 21–43 and accompanying text.

21. Michael T. Peddle, *TIF in Illinois: The Good, The Bad, and The Ugly*, 17 N. ILL. U. L. REV. 441, 442 (1997).

22. *Id.* at 443.

23. CRAIG L. JOHNSON, NAT'L ASS'N OF REALTORS, TAX INCREMENT FINANCING 3 (2002), http://www.realtor.org/SG3.nsf/files/TIFreport.pdf.

24. *See* Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145, 162–63 (1998) (illustrating that the local government must first designate a geographical area as a TIF district when implementing TIF).

25. JOHNSON, *supra* note 23, at 5.

26. *Id.*

eas at the base year.[27] The assessed value of property within the TIF district in the base year is the base assessed value (BAV).[28] After the base year is established, all taxing jurisdictions within the TIF district only share tax revenues generated by the BAV.[29] Therefore, the taxing districts are not deprived of their tax revenue. However, all taxes collected above the BAV belong to the redevelopment authority creating the TIF district.[30] No other taxing unit in the TIF district has a claim to this tax increment.[31] Specifically, this tax increment—the revenue resulting from the difference between the base year and the current year—is diverted to the redevelopment authority, which will use funds to finance the development project.[32] The TIF district collects the tax increment over its life, which typically spans twenty to thirty years,[33] and places it in a special tax-allocation fund until the district dissolves.[34]

Local governmental authorities usually issue bonds for a TIF project and use the funds from the bond issue to pay the project's preliminary development costs.[35] TIF bonds provide significant savings to developers because interest rates are much lower when obtained through government assistance than through financial institutions, and most of these bonds are tax exempt.[36] Subsequently, the increment collected in the district will be used to pay the principal and interest on the bonds.[37]

27. Josh Reinert, Comment, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, 45 ST. LOUIS U. L.J. 1019, 1026 (2001).

28. Klacik & Nunn, *supra* note 13, at 20.

29. *Id.* at 21.

30. JOHNSON, *supra* note 23, at 5.

31. *Id.*

32. Sam Casella, *What is TIF?*, *in* TAX INCREMENT FINANCING 1, 1 (James Hecimovich ed., 1985).

33. JOHNSON, *supra* note 23, at 13.

34. JIM CULOTTA, NAT'L ASS'N OF COUNTIES, TAX INCREMENT FINANCING: AN ALTERNATIVE ECONOMIC DEVELOPMENT FINANCING TECHNIQUE 4 (2000).

35. Casella, *supra* note 32, at 1.

36. JOHNSON, *supra* note 23, at 4.

37. *See* Jeffrey I. Chapman, *Tax Increment Financing as a Tool of Redevelopment*, *in* LOCAL GOVERNMENT TAX AND LAND USE POLICIES IN THE U.S. 182, 184 (Helen F. Ladd ed., 1998) ("[T]he increment in land value generates revenue to pay for the debt that was used to finance the expenditures that helped to cause the increment in land value.").

TIF project financing is not limited to bonds and may include additional techniques. For instance, a municipality may use its own funds to pay the initial development costs.[38] In such a case, the loan from the city is repaid using the tax increments.[39] Alternatively, a city may utilize the "pay-as-you-go" method under which developers obtain their own financing and pay for initial costs, and the city later uses the tax increments to reimburse the developer.[40] This approach allows cities to spend money on TIF projects only when revenue has is available, a politically attractive option for voters worried about municipal debt and tax increases.[41]

Perhaps the most appealing aspect of TIF is its flexibility. Per state statutes, TIF funds may generally be used, among other things, to construct utilities, acquire property, resell structures for residential use, or demolish outdated structures.[42] TIF may also be used to finance miscellaneous costs associated with a project, such as environmental studies, engineering surveys, and building specifications.[43]

B. HISTORICAL BACKGROUND OF TAX INCREMENT FINANCING

At its inception, TIF was a limited development tool statutorily restricted to redevelopment of blighted urban areas used to combat urban decay.[44] In recent years, however, states have allowed the use of TIF for numerous development projects and, as a result, TIF has become a comprehensive economic development device.

TIF originated in California in 1952 as a method of providing local matching funds for federal grants.[45] In the 1970s when California faced cuts in federal funding and Proposition 13, legislation that capped local property tax increases,[46] TIF became a source of revenue for economic development without

38. *See, e.g.*, 65 ILL. COMP. STAT. ANN. § 5/11–74.4–4(J) (WEST 2005).

39. *See id.* § 5/11–74.4–10.

40. Joyce Y. Man, *Determinants of the Municipal Decision to Adopt Tax Increment Financing*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 13, at 87, 93.

41. *Id.*

42. Casella, *supra* note 32, at 5.

43. *See* Reinert, *supra* note 27, at 1028.

44. Chapman, *supra* note 37, at 182; *accord* CULOTTA, *supra* note 34, at 1.

45. Klacik & Nunn, *supra* note 13, at 17.

46. *Id.*

having to raise property taxes.[47] California's success in using the financing capabilities of TIF did not go unnoticed. Several states adopted TIF laws by the 1970s,[48] and by 2003, all fifty states had enacted TIF laws.[49]

With such increasing use, TIF began to expand beyond its original intent. Municipalities and counties began to use TIF for a range of projects, including commercial retail and hotel endeavors.[50] Through that expansion, TIF also developed into a tool to relieve the fiscal stress[51] that often results from the increase in financial obligations of municipalities as they provided costly services, such as infrastructure improvements and police protection, to their residents and businesses.[52] Thanks to TIF, municipalities worried about fiscal stress could finance development projects without raising taxes or spending additional funds in hopes that the TIF projects would increase their tax base thereby generating more tax revenue.[53]

In addition, TIF became an incentive program for corporations and developers to build and locate in particular areas.[54] TIF is used as a tool for states to cope with rampant competition for business development and job creation in which state and local governments compete to recruit new companies, or alternatively, to retain existing companies in their cities.[55] Minneapolis, for example, used TIF to finance the Target Corporation's store and offices, and Los Angeles used TIF to help finance the expansion of the Los Angeles Convention Center.[56]

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47. JOHNSON, *supra* note 23, at 2.

48. As of 2000, forty-eight states and the District of Columbia had adopted TIF laws. CULOTTA, *supra* note 34, at 1.

49. In 2003, North Carolina, one of two states without such laws, authorized TIF legislation. 2003 N.C. Sess. Laws 2003-403, s.1-2.

50. CULOTTA, *supra* note 34, at 1.

51. Chapman, *supra* note 37, at 186. Fiscal stress, however, is relieved indirectly because the property tax is earmarked for debt service rather than going directly into the general fund of a blighted jurisdiction. *Id.*

52. *Id.* Chapman explains that cities determine fiscal stress levels in relation to other cities: "[I]t is also evident that some jurisdictions are more fiscally stressed than others. While 'unstressed' jurisdictions may consistently run budget surpluses, others are continually dipping into contingency accounts, borrowing from separate funds, instituting an array of new fees and charges, dramatically reducing services or allowing public infrastructure to deteriorate." *Id.*

53. *See id.*

54. CULOTTA, *supra* note 34, at 2.

55. *Id.* at 1.

56. Theresa J. Devine, N.Y. City Indep. Budget Office, Learning from Ex-

C. CORE REQUIREMENTS OF TIF-ENABLING STATUTES

The general procedural steps taken when using TIF include: (1) initiation, (2) plan formulation, (3) plan adoption, (4) plan implementation, and (5) plan evaluation and termination.[57] TIF laws range from simplistic to highly detailed, but possess commonalities as well. During the plan formulation stage, two substantive statutory requirements—a finding of blight and satisfaction of a "but for" test—provide the crux of implementing TIF. Most TIF controversies that arise stem from these constraints.

1. A Finding of Blight

TIF was originally intended to mitigate blight.[58] Blighted areas are thought to be a menace to public health, safety, and welfare, and often are defined to include defective street layouts, unsanitary conditions, and the decay of building structures.[59] A finding of blight creates the connection between private development and public use necessary for a government to exercise its eminent domain powers to fund such a project.[60] Statutes, however, rarely define what constitutes blight and do not precisely measure such statutory terms as "substantial" or "predominance."[61] Under Florida's blight statute, for instance, blighted areas are those characterized by a substantial number of slum or deteriorating structures, predominance of inadequate street layout, or unsafe conditions.[62] Over time, many states broadened the interpretation of a "blighted area" to include areas that are reaching a point of disrepair so that the TIF redevelopment would likely eliminate decaying areas and

perience: A Primer on Tax Increment Financing 3 (2002), *available at* http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf.

57. For a complete discussion of this five-stage process, see Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 13, at 31, 31–56.

58. Chapman, *supra* note 37, at 185.

59. *See* IOWA CODE § 403.2 (1999); OR. REV. STAT. § 457.010 (2003).

60. Johnson & Kriz, *supra* note 57, at 37.

61. *See, e.g.*, ARK. CODE ANN. § 14-168-301(3)(B) (Supp. 2005); KY. REV. STAT. ANN. § 99.340(2) (LexisNexis 2004); OHIO REV. CODE ANN. § 303.26(E) (LexisNexis 2003); WYO. STAT. ANN. § 15-9-103(a)(iii) (2005).

62. FLA. STAT. ANN. § 163.340 (West Supp. 2005).

stimulate growth.[63] In addition, many states permit property to be declared blighted where at least one of various subjective criteria is met.[64]

While some states require that a blight finding be quantified, most states allow nonquantified measurements.[65] By requiring a quantified finding, a state might strengthen its justification for using public funds for private development.[66] However, in those states not requiring a quantified blight standard, a general finding of economic benefit may be sufficient when the goal is to stimulate development of unblighted land.[67]

2. The "But For" Test

In addition to blight, statutes enabling TIF projects often require that a redevelopment authority satisfy a "but for" test in order to justify spending public funds. The "but for" test essentially asks: *But for* TIF, would the property have been developed?[68] If the area would not have been redeveloped without TIF, then the local government should benefit from the increased property tax base, which will in turn result in gains to neighboring tax jurisdictions, thus providing a public use.[69] On the other hand, if economic redevelopment would have occurred without public funds, then the tax increment would have also

63. Johnson & Kriz, *supra* note 57, at 37; s*ee also* Hous. & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662, 669 (Minn. Ct. App. 2001) (finding an auto dealership blighted because it was incompatible with nearby residential neighborhoods and created traffic safety and parking issues).

64. *See, e.g.*, 35 PA. STAT. ANN. § 1702(a) (West 2003). Pennsylvania can deem property blighted if there is "inadequate planning," "excessive land coverage," "lack of proper light," "defective design and arrangement of the buildings," "faulty street or lot layout," or "economically or socially undesirable land uses." *Id.*

65. JOHNSON, *supra* note 23, at 9.

66. *Id.; see, e.g.*, ALA. CODE § 11-99-4(3)(d)(1) (1994) (requiring the local governing body to adopt a resolution that contains findings that "[n]ot less than 50 percent, by area, of the real property within the tax increment district is a blighted area and is in need of rehabilitation or conservation work.").

67. *See, e.g.*, JG St. Louis W. LLC v. City of Des Peres, 41 S.W.3d 513, 523 (Mo. Ct. App. 2001) (finding blight where evidence showed that existing shopping mall needed to expand to remain commercially viable); Chapman, *supra* note 37, at 186.

68. *See, e.g.*, MINN. STAT. § 469.175, subdiv. 3(b)(2)(i) (2004); OHIO REV. CODE ANN. § 303.29 (LexisNexis 2003); S.C. CODE ANN. § 31-6-20(A)(5) (1991).

69. Peddle, *supra* note 21, at 445.

occurred and a public use was not served.[70] In this later scenario, the increment would provide the TIF district with unjustified revenue and would have unnecessarily subsidize a private developer.[71] Therefore, satisfaction of the "but for" test creates a link between using TIF in a given area and the public use required to exercise eminent domain in that area.

Determining whether economic development would have occurred in the absence of TIF is extremely difficult, especially when many proposed projects require condemnation and because statutes rarely offer any guidelines.[72] Most states require projects to satisfy some sort of threshold prior to approval, but the threshold "but for" tests are typically easy to satisfy and not uniformly applied.[73] A common "but for" test requires a simple finding that the development would most likely not occur without the assistance of public funds.[74] For example, Minnesota's "but for" finding statute requires only that "in the opinion of the municipality: (i) the proposed development or redevelopment would not reasonably be expected to occur solely through private investment within the reasonably foreseeable future."[75] Due to the broad and nonspecific language in typical "but for" findings by redevelopment authorities, there have been few challenges to this aspect of TIF laws.[76]

As a result of the ease of most "but for" findings, the public use necessary in many TIF projects also becomes relatively simple. Redevelopment authorities have little trouble articulating a public use when they can assert that private development would not otherwise occur. Moreover, the interpretation of public use has evolved to encompass most anything that will fit under the broad definition of public purpose, making the test for the appropriate use of TIF even less demanding.

70. Chapman, *supra* note 37, at 188.

71. *Id.*

72. *See* Johnson & Kriz, *supra* note 57, at 39.

73. *Id.* Johnson and Kriz note that Kansas is one of the few states that requires a comprehensive feasibility study. *Id.*

74. *Id.*

75. MINN. STAT. § 469.175 (2004).

76. Johnson & Kriz, *supra* note 57, at 39.

II. EVOLUTION OF THE PUBLIC USE REQUIREMENT IN TIF PROJECTS

A. PUBLIC USE VERSUS PUBLIC PURPOSE

Before TIF is utilized, cities and states must often exercise their eminent domain power thereby necessitating a showing of public use under the U.S. and state constitutions.[77] At the nation's founding, property rights were considered fundamental.[78] The Framers of the Constitution argued that property was necessary to secure all other rights and, as a result, protecting private property was the chief aim of government.[79] John Locke put forth this belief when he reduced all individual rights to property.[80] In 1790, John Adams reiterated this necessity when he declared: "Property must be secured, or liberty cannot exist."[81] Later, through the adoption of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the Constitution protected citizens against arbitrary takings by both federal and state governments.[82]

Given the primacy of the property rights at the founding, public use was defined and interpreted narrowly in this era. Public use for eminent domain purposes was not the equivalent to public purpose, a more expansive standard later developed by the courts. Instead, during the nineteenth and early twentieth centuries, the government's eminent domain power required a literal public use meaning that any taking should primarily benefit the public.[83] This interpretation restricted the power of eminent domain to the construction of such things as

77. *See, e.g.*, U.S. CONST. amend. V; MINN. CONST. art. I, § 13.

78. *See infra* notes 79–85 and accompanying text.

79. Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 337 (2001).

80. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 15 (J.W. Gough ed., Basil Blackwell & Mott, Ltd. 3d ed. 1966) (1690) ("[E]very man has a property in his own person . . . .").

81. JOHN ADAMS, DISCOURSES ON DAVILA 92 (Boston, Russell & Cutler 1805) (1790).

82. The Fifth Amendment affords protection from the federal government while the Due Process Clause in the Fourteenth Amendment incorporates the Bill of Rights and makes most provisions in those ten amendments applicable to the states. *See* Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).

83. Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3 (2003), http://www.lawrecord.com (follow "Achieves" hyperlink; then follow "Volume 27" hyperlink; then follow "Time to Return to Higher Scrutiny in Defining Public Use" hyperlink).

roads, mills, and parks.[84] As a result, public use encompassed that which intended to benefit the public directly and that which the public had a right to use.[85] Until the mid-twentieth century then, public use under the Constitution did not fit under the broad umbrella of public purpose.

Throughout the twentieth century and into the twenty-first century, public purpose emerged as the standard to satisfy public use under the Takings Clause. With this standard, takings were upheld if there was some indirect benefit to the public; the public was not required to be able to use taken property directly. The taking simply must serve some purpose to the public. Public purpose thus is an easier threshold to meet.[86]

Courts have also recognized the distinction between public use and public purpose.[87] When the government has taken private property and given it to a private party, courts have emphasized that finding a proper public use entails a stricter standard than finding a proper public purpose.[88] For instance, economic development is an important public purpose.[89] However, to take private property so a private developer party can develop it and thereby stimulate economic growth is not a public use.[90] As the Illinois Supreme Court, in *Gaylord v. Sanitary District*,[91] stated: "[T]o constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement."[92] Instead, courts historically indicated

84. Kruckeberg, *supra* note 17, at 546.

85. Kubasek, *supra* note 83.

86. *See infra* notes 114–24 and accompanying text.

87. *See infra* notes 88–93 and accompanying text.

88. *See* County of Armendariz v. Penman, 75 F.3d 1311, 1320–21 (9th Cir. 1996); Wayne v. Hathcock, 684 N.W.2d 765, 794–95 (Mich. 2004) (Weaver, J., concurring); S.W. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 7–11 (Ill. 2002).

89. *See, e.g.*, People *ex rel.* City of Canton v. Crouch, 403 N.E.2d 242, 248 (Ill. 1980).

90. *Hathcock*, 684 N.W.2d at 778–87. This rationale recognizes that every lawful business will assist in economic growth, and the rationale therefore does not allow a government to use its power of eminent domain. *S.W. Ill. Dev. Auth.*, 768 N.E.2d at 9. In this case, the development authority sought to take the property of an automobile recycling facility and transfer it to the operator of a nearby automobile racetrack to allow it to expand its parking lot. *Id.* at 3–4. The Illinois Supreme Court held the taking was not for a legitimate public use and was unconstitutional. *Id.* at 11.

91. 68 N.E. 522 (Ill. 1903).

92. *Id.* at 524.

that to satisfy public use, the public, not a private business, should be the primary beneficiary of the taking.[93]

B. ORIGINAL INTERPRETATION OF PUBLIC USE IN TIF LEGISLATION

At the same time that states were narrowly exercising eminent domain powers, they were adopting urban redevelopment and slum clearance statutes.[94] When states passed these statutes, they often did so with the intent of taking private property and allowing private developers to improve blighted areas.[95] For example, during the Great Depression, governments sought to design programs to assist the poor and improve housing conditions.[96] However, to satisfy eminent domain, those programs needed a public use. They were given that use in *New York City Housing Authority v. Muller,*[97] when the New York Court of Appeals found that slum housing was blighted and could be taken as a valid public use within the government's eminent domain power.[98] The decision consequently opened the door for a broader view of public use.

Because TIF has its roots in urban development and slum clearance statutes, TIF was originally limited to combating blight and eradicating decaying areas.[99] Only for such purposes did expending public funds for TIF projects constitute a public use. However, the Supreme Court altered the use of TIF when, in a seminal case, it expanded the concept of public use.[100]

93. *See* Limits Indus. R.R. Co. v. Am. Spiral Pipe Works, 151 N.E. 567, 570 (Ill. 1962); *Gaylord*, 68 N.E. at 524; *Hathcock*, 684 N.W.2d at 788 (Weaver, J., concurring); Bd. of Health v. Van Hoesen, 49 N.W. 894, 896 (Mich. 1891); Foeller v. Hous. Auth., 256 P.2d 752, 766 (Or. 1953).

94. Rogers, *supra* note 24, at 153–54.

95. *Id.*

96. *Id.*

97. 1 N.E.2d 153 (N.Y. 1936).

98. *Id.* at 156.

99. *See* Hudson Hayes Luce, Note, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 392–93 (2000) (describing blight as "the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions"); *see also* Kruckeberg, supra note 17, at 546–47.

100. *See* Berman v. Parker, 348 U.S. 26 (1954) (blurring the distinction between public purpose and public use).

C. *BERMAN V. PARKER*: EQUATING PUBLIC PURPOSE WITH PUBLIC USE EXPANDS TIF PROJECTS

In *Berman v. Parker*, the Supreme Court greatly broadened the meaning of public use.[101] At issue was the constitutionality of the District of Columbia Redevelopment Act of 1945.[102] The city sought to exercise its eminent domain power to take a private business in an economically depressed area and then transfer it to a private party for redevelopment.[103] The building owners argued that the taking of their property was unconstitutional because it was not slum housing.[104] In addition, they contended some of the property to be taken neither was in a blighted area nor endangered health or safety.[105]

The Court upheld the constitutionality of the taking and in doing so expanded the traditional notion of public use to incorporate the standard of public purpose.[106] The Court explained that, for a state government, the scope of public use encompasses its police powers such that any takings that benefit the health, safety, or welfare of the state's citizens are valid public use.[107] Furthermore, the Court acknowledged the power of government to attack blight in entire areas rather than eliminating it structure-by-structure.[108] Therefore, a nonblighted *property* could be taken if it was located within a blighted *area*.[109] Finally, the Court gave deference to legislative findings of blight,[110] citing the legislature as the "main guardian of the public needs."[111] *Berman* consequently resulted in a lenient public use standard for municipalities when exercising eminent domain.

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101. *Id.* at 33–35.

102. *Id.* at 28.

103. *See id.* at 27.

104. *Id.* at 36–37.

105. *Id.* at 34. ("[The property owners] maintain[ed] that since their building [did] not imperil health or safety nor contribute to the making of a slum or blighted area, it [could not] be swept into a redevelopment plan by the mere dictum of the Planning Commission or Commissioners.").

106. *See id.* at 35–36.

107. *Id.* at 32.

108. *Id.* at 34–35.

109. *Id.* at 35 ("Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending.").

110. *Id.* at 32–36. "In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." *Id.* at 33.

111. *Id.* at 32.

Berman had a profound impact on eminent domain and TIF cases. By declaring the legislature to be the appropriate place for defining blight, the Court gave states extensive authority to determine valid public uses.[112] States could utilize the deference bestowed by *Berman* to justify TIF and pass legislation to further almost any development project.[113]

Following *Berman*, courts interchangeably used standards of public use and public purpose, increasing the scope of the government's eminent domain power.[114] If a public body decided that a project was in the public interest, courts would defer to the public body's decision unless the determination was fraudulent, obtained under undue influence, or was manifestly arbitrary.[115] Exercising eminent domain for the benefit of a private entity was acceptable as long as it served some public purpose.[116]

Courts began to consistently give states wide latitude for takings. Traditional uses of TIF continued, but increasingly any generalized economic benefit constituted a public use. Such benefits included the creation of jobs,[117] parking ramps,[118] an increase in the tax base,[119] recreation facilities,[120] relief of fiscal

112. *Id.* at 38.

113. *See generally* Alexandra Marks, *Eminent Domain and Private Gain*, CHRISTIAN SCI. MONITOR, May 9, 2003, at 1, 3 ("According to the Institute for Justice . . . local governments went from condemning blighted areas to applying the practice to rundown neighborhoods.").

114. *See* R. E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337–41 (Minn. 1978) (en banc); *see also* Sch. Dist. of Pontiac v. City of Auburn Hills, 460 N.W.2d 258, 259 (Mich. Ct. App. 1990) (per curiam); Wolper v. City of Charleston, 336 S.E.2d 871, 875 (S.C. 1985); Meierhenry v. City of Huron, 354 N.W.2d 171, 176 (S.D. 1984).

115. *See, e.g.*, *R. E. Short Co.*, 269 N.W.2d at 337–41; *see also Sch. Dist. Of Pontiac*, 460 N.W.2d at 259.

116. *See Wolper*, 336 S.E.2d at 875; *Meierhenry*, 354 N.W.2d at 176.

117. Delogu v. State, 720 A.2d 1153, 1156 (Me. 1998) (holding that the expansion and modernization of a local shipyard facility served a public purpose because it would create increased employment levels).

118. *R. E. Short Co.*, 269 N.W.2d at 336–38 (declaring construction of a public parking ramp by a private developer to be in the public interest and permitting the use of TIF).

119. City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390–91 (Minn. 1980) (en banc) (concluding that TIF development of the City Center shopping facility in the downtown area served a public purpose because of the increase in tax revenue).

120. State v. Unified Gov't, 962 P.2d 543, 554 (Kan. 1998) (upholding the use of TIF for an automobile race track facility).

stress,[121] and tourism.[122] Moreover, a blight finding was relatively easy to satisfy, especially since *Berman* allowed condemnation of nonblighted property in blighted areas.[123] Now, with the recent United States Supreme Court decision in *Kelo v. City of New London*,[124] cities and states have virtually unfettered discretion in determining what constitutes a public use.

D. *KELO V. CITY OF NEW LONDON*

In 1998, the city of New London, Connecticut, sought to clear a portion of the Thames River waterfront in order to develop the property with commercial enterprises; a hotel, health club, Coast Guard museum, and office space, were to complement the already-existing Pfizer Corporation global research center.[125] To initiate the project, the city exercised its eminent domain power and condemned several homes.[126] The homeowners refused to leave and filed suit arguing the condemnation was an unjustified taking of their property.[127] New London contended that the condemnations served constitutional public uses because the proposed economic development plan would create jobs, increase tax revenues, and revitalize a distressed city.[128]

The Supreme Court of Connecticut agreed with the City that the mere promise of additional tax revenue justified the condemnations even when a private entity was to undertake

121. *See*, S. Bend Pub. Transp. Corp. v. City of South Bend, 428 N.E.2d 217, 219 (1981) (upholding the constitutionality of Indiana's tax allocation financing statutes for redevelopment in blighted areas, and noting that one of the legislature's purposes for passing such statutes was to address fiscal constraints); Chapman, *supra* note 37, at 186.

122. *See* State v. Miami Beach Redev. Agency, 392 So. 2d 875, 887–88 (Fla. 1980) (per curium) (discussing precedent that establishes promotion of tourism and entertainment among valid public purposes in addition to the traditional slum clearance and elimination of blight).

123. *See, e.g.*, Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie, 288 N.W.2d 85, 92–93 (Wis. 1980). The Wisconsin Supreme Court upheld the condemnation of a fraternity house, despite the fact that it was properly maintained. *Id.* It was a valid public purpose for the city to take it in order to create a TIF district because acquisition of the house was reasonably necessary to eliminate blight. *Id.* at 91–92.

124. 125 S. Ct. 2655 (2005).

125. *Id.* at 2659.

126. *Id.* at 2660.

127. *Id.*

128. *Id.* at 2658.

the economic development.[129] The court interpreted public use broadly to hold that an economic development plan that serves a public purpose constituted an appropriate use of eminent domain.[130] As long as there was a benefit to the public's general welfare, any benefit to a private entity was purely incidental.[131]

In a 5–4 decision, the United States Supreme Court affirmed the Supreme Court of Connecticut's decision[132] and embraced the broader interpretation of public use as public purpose. The Court found that while New London was not opening the condemned land to use by the public,[133] the city carefully considered the development plan and determined that it would benefit the community through new jobs and increased tax revenue.[134] The Court emphasized its deference to legislative judgments as to what the public needs in order to justify a taking based on economic development.[135] Promoting economic development, according to the *Kelo* Court, has traditionally been a government function, and there is no principled way to distinguish it from other public purposes.[136]

Kelo swung open the door to virtually any taking for economic benefits and will likely bolster the use of eminent domain in TIF projects across the country. With *Kelo* in their arsenal, cities and states, absent stricter state public use standards,[137] may utilize TIF for most any development project as long as it serves some broad public purpose.

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129. *See* Kelo v. City of New London, 843 A.2d 500, 531–36 (Conn. 2004) (en banc), *aff'd* 125 S. Ct. 2655 (2005).

130. *Id.* at 527–28.

131. *Id.* at 531–32.

132. *Kelo*, 125 S. Ct. 2665–66. Justice Stevens delivered the majority opinion in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. *Id.* at 2658. Justice Kennedy also filed a concurring opinion. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. *Id.* Justice Thomas also filed a separate dissenting opinion. *Id.*

133. *Id.* at 2662.

134. *Id.* at 2665.

135. *Id.* at 2664–65, 2668. "[O]ur public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 2664. "[W]e also decline to second-guess the City's determination as to what lands it needs to acquire in order to effectuate the project." *Id.* at 2668.

136. *Id.* at 2665.

137. The majority in *Kelo* noted that the opinion does not preclude any state from placing further restrictions on the takings power. *Id.* at 2668.

III. HOW CURRENT LEGISLATIVE STANDARDS CAN LEAD TO ABUSE OF TIF IN ECONOMIC DEVELOPMENT PROJECTS

With the legislative deference bestowed by *Kelo*, and with economic development constituting a valid public use under the Takings Clause, the use of TIF is likely to spread as statutory and constitutional requirements have become even easier to meet. As the TIF continues to develop, these new standards may lead to abuse of TIF in development projects.

A. UNDER *KELO* BLIGHT AND "BUT FOR" ARE RENDERED MEANINGLESS

Most states require that a proposed TIF area be blighted and meet a "but for" test. However, states legislatures have often not been given judicial guidance in how to establish their statutory criteria to accord with constitutional principles. The courts' silence and deference to legislatures results in a lack of objective standards and inconclusive definitions of blight and the "but for" test leading to constitutionally suspect takings in connection with TIF projects.

Some TIF-enabling statutes, for example, traditionally define blight,[138] but an area may also be blighted if declaring it as such will discourage commerce or industry from moving to another state.[139] In practice, blight findings depend upon municipalities' and developers' interpretation of the "but for" test[140]—those same entities fueling the process in the first place. As a result, redevelopment authorities often avoid genuinely blighted areas and instead focus on those areas that contain some conditions that will fit under the broad interpretation of blight in order to attract developers to a project.[141]

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138. *See, e.g.*, MO. REV. STAT. § 99.805(1) (2000). Missouri defines blight as:

> an area which, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

Id.

139. *See, e.g.*, *id.* § 99.805(5).

140. Reinert, *supra* note 27, at 1034.

141. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 322–25

Take Best Buy. Its desired relocation area in Richfield was not deleterious, infested with crime, or even at risk for deterioration,[142] however, its tax revenues were decreasing.[143] If Richfield had been truly blighted, it is unlikely that Best Buy would have settled there; under such conditions the city would have been inadequate to meet the company's labor, market, transportation, and infrastructure needs. Instead, by utilizing a broad interpretation of blight under the TIF statutes to condemn property, Richfield was able to attract Best Buy to the city.

In addition, statutory standards become virtually meaningless when local government determines, interprets, and applies the "but for" test and blight standards.[144] Often, a municipality declares an area blighted and asserts that the "but for" test has been met without requiring a complete investigation into any findings.[145] With such simple thresholds to utilize TIF, coupled with liberal notions of what constitutes public use under eminent domain,[146] TIF can be used for almost any project.[147]

(2004).

142. *See* Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391, 394 (Minn. Ct. App. 2001) (noting that the initial investigation into the proposed TIF district found the area to be in generally good condition).

143. THE INT'L ECON. DEV. COUNCIL, *supra* note 3, at 23.

144. *See* Gordon, *supra* note 141, at 320–25; *cf.* Rogers, *supra* note 24, at 169 (arguing the TIF statutes of some states are so broad that they provide no restriction at all).

145. *See Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d at 394–95; Gordon, *supra* note 141, at 323–25. For example, the city of Richfield hired a firm to investigate the conditions of buildings in the area slated for Best Buy because, pursuant to section 469.174, subdivision 10(a)(1) of the Minnesota Statutes, property cannot qualify as a TIF district unless there is a showing that 50 percent of the buildings are structurally substandard. *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d at 394. The firm concluded that 91 percent of the buildings fit the criteria, though it inspected the interior of only 20 percent of the buildings and did not review any fire or police reports for the properties. *Id.* The Minnesota Court of Appeals, however, found the TIF district to be created unlawfully. *Id.* at 404.

146. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005) (finding that the prospect of new jobs and increased tax revenue was a valid public use); State v. Miami Beach Redev. Agency, 392 So. 2d 875, 891 (Fla. 1980) (per curium) (permitting a redevelopment agency to condemn private residential land in order to redevelop it and sell the land to private individuals, associations, or corporations for private commercial and industrial purposes).

147. *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 7 (2003), *available at* http:///www.castlecoalition.org/report/pdf/ED_report.pdf (discussing how using increased taxes and jobs as justifications for the exercise of eminent domain leaves almost any property up for grabs).

Such flexibility is cited as one of TIF's strengths.[148] Perhaps this is true for TIF used outside the context of eminent domain, but when government must take private property, constitutional principles and individual rights are implicated. Instead this flexibility, when coupled with the power of eminent domain, has increased the number of TIF projects while not necessarily increasing tax revenues within TIF districts.[149] In 1998, for instance, California reported that utilizing TIF resulted in two dollars spent for every dollar gained.[150]

With the increased use of eminent domain in conjunction with TIF projects, challenges to the condemnations arise, but remain an uphill battle when it is not required that specific definitions and standards be met before designating a TIF district. In Lakewood, Ohio, for instance, the city sought to build new luxury condominiums and an upscale shopping mall overlooking a riverfront in order to increase and strengthen its tax base of aging residents, despite the areas existing, well-maintained neighborhood.[151] In order to use eminent domain and support a finding of blight, the city changed its blight standard.[152] Under the new standard a home was blighted if it did not have three bedrooms, two baths, an attached two-car garage, and central air.[153] In Mount Lebanon, Pennsylvania, private owners of an upscale shopping mall sought a blight designation in order to qualify for TIF so they could revamp "the mall's parking garage and redesign an intersection leading to the mall."[154] However, the conditions cited as blighted were minor problems due to simple neglect and poor upkeep.[155] Ultimately, this TIF project was rejected by the city's school

148. Reinert, *supra* note 27, at 1036.

149. *See* BERLINER, *supra* note 147, at 26–27; Reinert, *supra* note 27, at 1037.

150. BERLINER, *supra* note 147, at 26–27.

151. *Eminent Domain: Being Abused?*, CBSNEWS.COM, July 4, 2004, http://www.cbsnews.com/stories/2003/09/26/60minutes/printable575343.shtml.

152. *Id.*

153. *Id.*

154. Eric Montarti, *Tax Increment Foolishness*, ALLEGHENY INST. FOR PUB. POL'Y, June 10, 2002, http://www.alleghenyinstitute.org/briefs/ vol2no29.pdf.

155. *Id.*

board,[156] and the Ohio project was rejected by the voters of Lakewood.[157]

Local governments, like Lakewood, may often freely determine statutory definitions.[158] As a result, property owners and area citizens are rarely successful when challenging a finding of blight and a "but for" determination,[159] especially when courts afford great deference to state legislatures.

B. TIF MAY CAUSE A LOSS OF CONTROL OVER TAX BASES

While an increase in a tax base is cited as a valid public use for TIF projects, TIF districts pose potentially negative effects to the tax base in the form of cost spillovers and increased taxes in neighboring areas.[160] Ideally, TIF would be a self-financing mechanism, as its proponents contend.[161] However, local government at the county level is often ignored in the TIF process. When states permit a city to create TIF districts without any approval at the county level, it can result in diverting tax revenue from the county to a city development project.[162] Consequently, taxpayers outside the TIF district may need to meet the tax differential.[163] Municipal-service costs, such as police, fire, sanitation, and transportation, typically rise as TIF projects develop.[164] Since property taxes for those property owners within the TIF district are based upon assessments made before the commencement of the TIF project, property taxes collected within the district are likely to fall short of being able to meet the increasing cost of municipal services. Con-

156. Jake Haulk & Frank Gamrat, *The Lazarus TIF—The Start of Something Bad*, ALLEGHENY INST. FOR PUB. POL'Y, Jan. 21, 2004, http://www.alleghenyinstitute.org/briefs/vol4no3.pdf.

157. Lakewood Public Library, Proposed West End Project, http://www.lkwdpl.org/currentevents/westend (last visited Sept. 28, 2005) (indicating that the proposal failed by 47 votes).

158. *See supra* notes 140, 144–45, 152–53 and accompanying text.

159. *See* Peddle, *supra* note 21, at 448–50.

160. *See* Devine, *supra* note 56, at 5.

161. Joyce Y. Man, *Introduction* to TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 13, at 1, 3.

162. CULOTTA, *supra* note 34, at 5.

163. *Id.* Brandt Richardson, Administrator for Dakota County, Minnesota noted that, "This [loss of control over property tax rolls] is compounded by the fact that TIF-induced development imposes real, additional costs on county government, which must be passed on to non-TIF taxpayers." *Id.*

164. Devine, *supra* note 56, at 5.

sequently, taxpayers outside the district may be called on to pay additional taxes to account for lost revenue.[165]

While it is possible that an increase in sales and income taxes generated within a TIF district will cover these additional service costs,[166] it is difficult to determine the amount of additional tax revenue at the outset of a given project. Furthermore, at least one study suggests that TIF subsidies help growth within the district at the expense of growth outside the district.[167] Overall, cities and counties are confronted with uncertainty accompanying the adoption of TIF districts, as those authorities are not able to adequately assess the future of their tax revenues.

C. TIF GIVES PREFERENTIAL TREATMENT TO PRIVATE DEVELOPERS

Private developers are the driving force behind the use of TIF[168] because TIF depends upon increases in property values and is more aptly suited for commercial investment projects.[169] As a result, private developers seek to utilize the broad discretion afforded in most TIF statutes to subsidize a potentially profitable venture.[170]

When statutory compliance with the requirements of a blight finding and the "but for" test is loosely defined, private developers can easily obtain the benefit of TIF.[171] In conjunction with a local government, these developers must identify only one problem implicating health and safety in the development area to qualify it as blighted.[172] In addition, the "but for" test often allows private developers themselves to determine natural economic growth prospects in a potential development area[173] By permitting private developers to work so closely with

165. *Id.*

166. *Id.*

167. Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development* 22 (Inst. of Gov't and Pub. Affairs, Working Paper No. 75, 1999), *available at* http://www.igpa.uiuc.edu/publications/workingpapers/WP75-TIF.pdf.

168. *See* Gordon, *supra* note 141, at 321–22.

169. *Id.* at 319.

170. *Id.* at 320–22.

171. *See id.* at 322–29.

172. *Id.* at 320–21.

173. *Id.* at 324.

a government when it proposes a TIF project, a local government may fail to give adequate consideration to state and regional concerns.[174]

Furthermore, local governments and private businesses do not necessarily looking out for the public benefit. Municipalities will agree to condemn and take private property because not only do they foresee substantial economic benefits for the public, but they also will not have to pay for the property, any attorney's fees, and any additional studies needed to get approval for the proposed TIF project. Private developers like to work with governments because "just compensation"[175] will likely be less than what private developers would pay on the open market.[176] Condemnation statutes require that the government pay only fair market value of the property;[177] the government does not have to consider additional costs of relocation that may be incurred by the property owner, or the emotional costs of detachment from a home.[178] Moreover, in today's real estate market, the fair value of an older home may only buy a smaller, comparable home.[179] For businesses, just compensation does not cover the loss of goodwill or the costs of moving an established business to a different locale.[180] Thus, private developers would rather use the government's power than negotiate a price with private owners themselves.

Additionally, preferential treatment of commercial interests may not result in any overall benefit.[181] Cities and states often compete over attracting business firms to their respective locations and will use TIF as an incentive.[182] If a firm moves a short distance from City A to City B, there is little economic benefit to the region.[183] Yet if TIF is used, City B may see some economic benefit, but the region as a whole will lose by paying

174. *See id.* at 321–23 (explaining how the determination of blight is driven by private investment).

175. U.S. CONST. amend. V.

176. *See, e.g.*, ALA. CODE § 18-1A-22 (LexisNexis 1997); ARIZ. REV. STAT. ANN. § 12-1122(C) (2003); COLO. REV. STAT. § 24-56-117 (2004); KAN. STAT. ANN. § 26-513 (2000); BERLINER, *supra* note 147, at 6–7.

177. *See, e.g.*, ALA. CODE § 18-1A-22; ARIZ. REV. STAT. ANN. § 12-1122(C); COLO. REV. STAT. § 24-56-117; KAN. STAT. ANN. § 26-513.

178. BERLINER, *supra* note 147, at 6–7.

179. *Id.* at 6.

180. *Id.* at 7.

181. Man, *supra* note 161, at 5.

182. Man, *supra* note 40, at 95.

183. Peddle, *supra* note 21, at 453.

a subsidy to the business that would have remained in the region employing the same population regardless of TIF incentives.[184]

Moreover, competition may make it more difficult for local governments to redistribute money and services to its low-income citizens.[185] Typically, local fiscal systems are designed to give more public services and require less in taxes by low-income residents while businesses and upper-income residents pay more taxes and receive less in public services.[186] However, with competition comes increasing mobility of businesses, making redistribution by local government authorities more challenging.[187] TIF may thereafter reward private development and overlook the overall effects on a local region.

D. TIF DEVELOPMENT IS UNABLE TO ENSURE PUBLIC BENEFITS

Since private developers ultimately drive the use of TIF, the public is only minimally involved in TIF development projects and is not guaranteed any benefit from such development. In fact, several studies have found that the growth rates in TIF districts are usually not significant or increase to the detriment of other communities.[188] One city auditor noted that a typical project produced only 23.7 percent of projected revenues and questioned the effectiveness of TIF because the private sector steers the process.[189] A study conducted by the Public Policy Institute of California found that TIF projects produced small gains in economic growth while resulting in a higher allocation of tax revenue to the local redevelopment agency.[190] Likewise, economists Dye and Merriman determined that TIF adoption in one district may stimulate growth in that district at the expense of the larger city.[191]

184. *Id.*

185. Timothy J. Bartik, *Eight Issues for Policy Toward Economic Development Incentives*, REGION, June 1996, at 43, 45.

186. *Id.*

187. *See id.*

188. *See* BERLINER, *supra* note 147, at 26–27; Dye & Merriman, *supra* note 167, at 25.

189. Sinclair Mktg., Inc. v. Tax Increment Fin. Comm'n, No. 99-0374-CV-W-6, 1999 U.S. Dist. LEXIS 7447, *5 n.2 (W.D. Mo. May 17, 1999).

190. BERLINER, *supra* note 147, at 26–27.

191. Dye & Merriman, *supra* note 167, at 25. Specifically, Dye and Merriman found that one particular TIF area gain of $1.6 million in property value cost the non-TIF area $4.4 million. *Id.* at 29.

When a city uses eminent domain to transfer land to a private developer, the initial, articulated public use is left in the hands of the private developer to facilitate.[192] Any benefit to the public will depend upon the management quality of the private development team, the whims of the current marketplace, and the quality of the businesses set to occupy the TIF district.[193] The public is given no assurance of benefits, has little to no control over how the private developer finally implements the TIF plan, and has no recourse if the TIF project ultimately fails.[194] While it is not always feasible to give the public definite guarantees, it is possible to revise standards in order to provide more legitimacy behind TIF projects—a necessity when public funds and private developers are involved.

IV. REFORMING PUBLIC USE AND RENEWING CONFIDENCE IN TIF PROJECTS

A. COURTS MUST ABANDON THEIR DEFERENCE TO LEGISLATURES AND GIVE GUIDANCE WHEN APPLYING EMINENT DOMAIN PRINCIPLES

Currently, courts grant state legislatures great deference when it comes to finding a public use, resulting in TIF districts for a wide variety of projects.[195] When legislatures are deciding policy issues, deference is appropriate since legislatures are policy-making entities. However, eminent domain and TIF are not mere policy issues. Both involve constitutional concerns, requiring judicial interpretation and guidance.

By giving legislatures deference to determine public use courts ignore the inherent constitutional core of TIF projects and, more significantly, their judicial obligations.[196] The judici-

192. *See* Rogers, *supra* note 24, at 172–73.

193. *Id.* at 174.

194. *See id.*

195. *See, e.g.*, R. E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978) (en banc); Wolper v. City of Charleston, 336 S.E.2d 871, 875 (S.C. 1985). *But see* Christensen v. Boston Redev. Auth., 804 N.E.2d 947, 951 (Mass. App. Ct. 2004) ("The . . . determination that a project site is blighted must be supported by substantial evidence.").

196. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803). Chief Justice Marshall wrote:

> It is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if

ary has the power to interpret the Constitution, apply its principles, and instruct on its proper use.[197] Consequently, when confronted with an eminent domain issue, such as those that arise in TIF, courts should be clear on how to apply public use and not rely on a subjective and generic "generalized economic benefit" rationale.[198]

The Framers did not intend public use to entail a general economic benefit.[199] Such a rationale opens the door to eminent domain abuse. Lower-tax producing businesses are more likely to be taken and replaced with higher-tax producing ones.[200]

> a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty.

Id. at 176.

197. *See id.*

198. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting). Justice O'Connor admonished the majority for not following its constitutional duty: "[T]he Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility." *Id.* Note, however, that some states did take control after *Kelo* by introducing legislation to clarify that a general economic benefit is not the equivalent of a public use in condemnation proceedings. For example, on August 31, 2005, Texas Governor Rick Perry signed this type of legislation into law. Press Release, Rick Perry, Texas Governor, Gov. Perry Signs New Law Protecting Property Rights (Aug. 31, 2005), http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-08-31.3313. The Delaware Senate also recently passed such legislation. *See* S.B. 221, 143rd Gen. Assem. (Del. 2005) (prohibiting condemnation of private property where no specific public use is to be made of the property and specifically excluding revenue generation, economic development, and redevelopment of currently occupied residences as public uses). The legislation now awaits a vote by the Delaware House. *See* DELAWARE GENERAL ASSEMBLY, 143RD GENERAL ASSEMBLY: SENATE BILL # 221 W/SA 1, SA 2, http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/SB+221 (last visited Oct. 27, 2005).

199. *See Kelo*, 125 S. Ct. at 2681–82 (Thomas, J., dissenting) (outlining the early history of public use and how the Court has erred in equating public use with public purpose); *supra* notes 77–85 and accompanying text.

200. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting) ("The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."). Immediately following the Supreme Court's *Kelo* decision, public officials in Freeport, Texas began proceedings to take two family-owned companies to make way for an $8 million private boat marina. *See* Web Release, Institute for Justice, Homeowners Ask U.S. Supreme Court: Rehear Eminent Domain Case, (July 18, 2005), http://www.ij.org/private_property/connecticut/7_18_05pr.html.

Those citizens with greater influence, power, and wealth are more likely to benefit from such a wide-ranging public use rationale,[201] especially when poorer homeowners and small businesses do not have ample financial resources to challenge and litigate an eminent domain action.[202]

The Framers of the Constitution could not have intended this perverse result when they wrote the Fifth Amendment. The judiciary fails to do its duty when it gives absolute deference to legislatures to determine what comprises public use. Deference in the name of institutional competence should not be transformed into free reign for legislatures to ignore the mandate of the Due Process Clauses of the Fifth and Fourteenth Amendments.

B. BRING BLIGHT AND "BUT FOR" BACK TO THEIR ROOTS

Blight was developed to encompass the wide range of projects that local government and private developers presently contemplate.[203] Therefore, in order to validate the use of TIF, a stricter definition of blight and the "but for" test should be implemented. For example, a general finding that increased traffic negatively affects public safety should be insufficient to support a finding of blight when the increased traffic has posed no problems and buildings adequately fit their intended use.[204] To hold otherwise would be to ignore individual property rights. If TIF projects adhere to stricter standards, a public use will be served under TIF statutes.

By allowing TIF projects only where blight will not be eradicated without the help of TIF, the "but for" test will ensure that public funds are going to a public use and not solely to private developers' coffers. A stricter definition of blight and mandatory application of the "but for" test would also give TIF projects more legitimacy and, more importantly, would justify the use of eminent domain. In theory, freezing a blighted tax base should result in a much larger tax increment, so TIF would naturally be more successful in truly blighted areas.

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201. *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting) (describing the disproportionate effect of economic benefit takings and the potential to transfer property from those with fewer resources to those with more under a public use rationale).

202. *See* Web Release, Institute for Justice, *supra* note 200.

203. Rogers, *supra* note 24, at 152–55.

204. *See* Hous. & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

Various standards for blight would suffice. For example, a blighted area could be characterized by:

> the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe for such purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one . . . of the following factors:
>
> (a) Defective design and character of physical construction.
>
> (b) Faulty interior management and exterior spacing.
>
> (c) . . . overcrowding.
>
> (d) Inadequate . . . ventilation, light, [and] sanitation.
>
> (e) Age, obsolescence, deterioration, [and] dilapidation . . . .[205]

This definition adheres to the original notion of blight and provides stricter criteria to find blight than most of today's TIF statutes.[206] Under this definition, in order to qualify as blight, not only must an area be unfit or unsafe to use and conducive to sickness and crime, it must also be marked by at least one of the above-proposed factors. In this way, a blight designation must be based on multiple characteristics rather than on only general findings of public health and safety concerns.[207]

In addition, requiring a "but for" finding as a prerequisite to proceed with TIF projects would add authority to the use of TIF. A stringent statute with a "but for" standard would necessitate a determination, supported by concrete facts and independent review, that the redevelopment of the slated TIF area could not be accomplished by private enterprise acting alone. To protect constitutional principles, a statute may go even further by adding that TIF projects necessitating the use of eminent domain involve a compelling economic need.[208] In con-

205. CAL. HEALTH & SAFETY CODE § 33041 (1951) (repealed 1963) (current version at CAL. HEALTH & SAFETY CODE § 33031 (West Supp. 2005); *see also* Redev. Agency v. Hayes, 266 P.2d 105, 112 (Cal. Ct. App. 1954) (citing blight criteria set forth in the CAL. HEALTH AND SAFETY CODE § 33041).

206. For an example of a current, broad blight definition, see ARIZ. REV. STAT. ANN. § 36-1471(2) (Supp. 2004).

207. *Cf.* Berman v. Parker, 348 U.S. 26, 32 (1954) (declaring the legislature as the main guardian of the public needs to be served by legislation enacted in exercise of the police power even when eminent domain is involved); *Hous. & Redev. Auth*. 630 N.W.2d at 668–69 (approving the city's finding of blight where car dealerships were located close to residential homes, allegedly caused too much noise, brought heavy traffic to the dealerships, and had inadequate parking, despite a building consultant's finding that the spaces were not obsolete for their use).

208. *Cf.* Schneider v. Dist. of Columbia Redev. Land Agency, 117 F. Supp.

structing a "but for" statute in this manner, legislatures will ensure that TIF projects occur only in truly blighted areas and will avoid giving private developers incentives to do what is already in their own best interest.

Therefore, tighter limitations on condemning land and transferring it to private developers should apply to TIF projects. Public use is not equivalent to public purpose, as the *Berman* and *Kelo* courts proclaimed.[209] To be a public use, a TIF project should entail public oversight, be necessary for things like public infrastructure, roads, railroads, and instrumentalities of interstate commerce, or be based upon a public concern like slum clearance.[210]

The Court in *Kelo* ignored the original intent of public use and demonstrated why TIF statutory requirements must be stricter.[211] *Kelo* perpetuates a broad interpretation by regarding a generalized economic development as sufficient public use.[212] While it was a worthy goal to revitalize the New London's riverfront area, it is possible that the use of eminent domain and TIF were not necessary to facilitate development, as private developers would likely have eventually developed the property regardless of incentives because of Pfizer's global research facility already existing along the Thames River.[213]

Likewise, a government should not be free to take private property and give it to another private owner simply because the government believes the land is not being put to its most desirable use.[214] Using a tool as drastic as eminent domain re-

705, 723 (D.D.C. 1953) (noting that a finding of a compelling economic need justifies the exercise of eminent domain).

209. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2682–84 (2005) (Thomas, J., dissenting); *see also* County of Wayne v. Hathcock, 684 N.W.2d 765, 778 (Mich. 2004) (recognizing that Wayne County's intentions in building the Project—creating jobs and increasing tax revenue—were valid public *purposes*, while clarifying that giving the condemned property to private developers was not a public *use*).

210. *Hathcock*, 684 N.W.2d at 781–82.

211. *See* Kelo, 125 S. Ct. 2655.

212. *See id.* at 2664–65

213. *Id.* at 2659; *cf.* Gordon, *supra* note 141, at 322, 324 (discussing private investors holding out for "the blight that's right" in order to receive TIF subsidies); Rogers, *supra* note 24, at 176 (explaining that TIF is being used increasingly at the request of developers).

214. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting) (noting that the logic of the majority allows eminent domain only to upgrade, not downgrade, property); Schneider v. Dist. Of Columbia Redev. Land Agency, 117 F. Supp. 705, 724 (D.D.C. 1953) ("One man's land cannot be seized by the Government

quires careful observance of individual rights and the original conception of public use. Only by employing the "but for" test and a more restrictive definition of blight can TIF meet these requirements and pass constitutional muster.

C. LEGISLATURES MUST PROVIDE OBJECTIVE STANDARDS TO ESTABLISH TIF DISTRICTS

Where TIF enabling statutes require satisfaction of the "but for" test, cities are given discretion in determining whether blight exists in a particular area and whether the "but for" test has been satisfied.[215] This discretion results in too much subjectivity and inadequate accountability, thereby failing to ensure the proper use of public funds.[216] Today most state statutes do not define blight in specific terms or require comprehensive studies demonstrating satisfaction of the "but for" test.[217] Most state statutes do not command municipalities to quantify blight findings, predict future results, find a specific number of blighted conditions, or undergo any formal review throughout the project.[218] As a result, proposals for TIF districts receive practically automatic approval without much evidentiary support of the need for TIF.

To remedy this, state legislatures should require specific quantified findings and procedural hurdles before a TIF project is put into effect. First, more than one blight condition should

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and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well designed."); Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 464 (Mich. 1981) (per curiam) (Fitzgerald, J., dissenting) (describing how no property is immune from condemnation for the benefit of private interests that will put it to "higher use" when a general economic benefit rationale is used), *overruled by Hathcock*, 684 N.W.2d 765.

215. *See Kelo*, 125 S. Ct. at 2664, 2668 (declaring the legislature the appropriate authority to determine what constitutes a public use).

216. *But see* George Lefcoe, *Finding the Blight that's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1005–08 (2001) (noting several negative consequences that might result from a more restrictive definition of blight).

217. *See* Johnson & Kriz, *supra* note 57, at 38–39.

218. *See id.* at 38–43; *see also, e.g.*, IND. CODE § 36-7-14-41(b)(1) (LexisNexis 2004) (permitting the commission to determine that a geographic area is an economic development area if it finds that the plan "(A) Promotes significant opportunities for the gainful employment of its citizens; (B) Attracts a major new business enterprise to the unit; (C) Retains or expands a significant business enterprise existing in the boundaries of the unit; or Meets other purposes [specified in the statute]").

be found to support a blight label.[219] In addition, quantified findings of blight should entail in-depth analysis of a TIF area, including scrutinizing the physical structures, economic conditions, and criminal activity within an area.[220] Quantifiable criteria are inherently more straightforward and provide a good safeguard against potential abuse.[221] Finally, a finding of blight should be supported with evidence from an independent agency or consultant, and not rest on the determination of biased redevelopment agencies and private developers.[222]

Furthermore, municipalities should not head into a TIF project haphazardly. Redevelopment authorities should be expected to formulate predictions for future costs and benefits for the public, while assessing the state of the local economy, the impact of the project on community citizens, and any possible changes in policy.[223] A cost-benefit analysis would legitimatize the use of TIF by essentially confirming that the project meets the public use requirement as the term was originally interpreted. By undergoing a genuine cost-benefit analysis, cities should naturally be limited to using TIF for projects such as slum clearance, railroad creation, and eliminating unfit housing—all valid public uses through the act of condemning and exercising eminent domain.[224]

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219. *Compare* S.C. CODE ANN. § 6–33–30(1) (1991) (lacking a requirement that more than one blight condition be found before a property is labeled blighted) *with* MINN. STAT. § 469.002, subdiv. 11 (2004) defining a "blighted area" as

> any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

MINN. STAT. § 469.002, subdiv. 11.

220. *See* JOHNSON, *supra* note 23, at 8–9 (explaining that broad definitions of blight, particularly those without quantifiable and measurable criteria, nullify TIF statute provisions that require officials to opine on the level of blight in a potential project area).

221. *See* Johnson & Kriz, *supra* note 57, at 38.

222. *See* Rogers, *supra* note 24, at 174–75.

223. *See* Kruckeberg, *supra* note 17, at 578–79.

224. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 779–82 (Mich. 2004) (differentiating between acts of condemnation that served a public use and condemning land that will eventually be put to public use). The *Hathcock* court noted that, "the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement." *Id.* at 783.

Finally, an independent board should objectively review TIF proposals to prohibit any abusive use of the power of eminent domain.[225] This oversight mechanism could include economists, outside city planners, disinterested private developers, and local citizens, ensuring that private-public TIF ventures remain accountable to the public.[226] In total, objective standards would reduce the possibility of a revenue shortfall and instill public confidence in the development.

D. LOCAL GOVERNMENTS MUST LIMIT THE RIGHTS OF PRIVATE DEVELOPERS RECEIVING THE BENEFITS OF TIF

Presently, private developers are the driving force behind TIF because they want to reduce their expenses associated with a development project. Governments should therefore be wary of being pushed into projects that are not in their constituents' best interests.

Private developers wishing to condemn private property for a TIF district should first explore other financing alternatives.[227] They could enter into good faith discussions with property owners and consider viable proposals rather than turning to taxpayer-subsidized redevelopment.[228] By doing so, private developers will produce evidence that TIF may be the only feasible method for a proposed project, thereby lending credence to the "but for" requirement. In addition, before resorting to TIF, private developers should research the proposed development, including the market area and possible tax revenues, to help ensure that the tax increments will not fall short.[229] If TIF is eventually utilized, private developers should bear some of the risk that the TIF will not produce enough revenue. For example, the government of Hoffman Estates, Illinois required that

225. *See* Gordon, *supra* note 141, at 326–27, 333–34 (discussing the politics surrounding TIF projects and abuse of redevelopment laws).

226. *Id.*

227. *See generally* Peddle, *supra* note 21, at 448–54 (discussing widespread misuse of TIF in Illinois).

228. Rogers, *supra* note 24, at 176–77 ("Non-TIF options may include considering offers from other developers that do not require tax subsidies, as well as entering into discussions and negotiations with current owners regarding ways to increase tax revenues.").

229. *See generally* Haulk & Gamrat, *supra* note 157 (documenting the quick and growing use of TIF in retail and its potential negative consequences).

Sears enter into a loan guarantee and pay the difference when the tax increments fell short of required payments and projected revenues.[230]

A public oversight mechanism will also provide accountability on the part of cities and private developers while comporting with eminent domain and public use principles. Statutory and contractual restraints, rather than formal public oversight, are not sufficient to focus a private developer on the anticipated public benefit.[231] Instead, when courts defer to legislatures' judgments, they neglect to recognize the profit motivations of private developers and the legislatures inability to guard against any potential misuse of public funds.[232]

More significantly, taken cumulatively, these suggested limitations and regulations will secure public support for TIF projects. Private business firms will be less likely to make any relocation or expansion decisions solely because a city offers TIF incentives. These suggested changes will compel these businesses instead to thoroughly evaluate where they can simply receive tax breaks. All the while, the public would have some power to influence projects, instilling greater legitimacy in TIF endeavors between cities and private developers.

CONCLUSION

TIF remains a viable economic development tool. Problems and abuses have arisen because the application of TIF has been too broad and outside the scope of its initial intent. State legislatures can return TIF to its original purposes by tightening the blight and "but for" standards, providing an independent review of the procedures, and placing more restrictions on the private developers benefiting from TIF. In turn, the TIF project will be legitimized and eminent domain principles will remain intact.

The United States Supreme Court's decision in *Kelo v. City of New London* failed to recognize the fundamental importance of property rights in this country and the difference between public use and public purpose. Eminent domain may often be a necessary means for a government to promote development and perform its duties. Yet, if government is to take private property from private individuals only to allow another private en-

230. *See* Devine, *supra* note 56, at 4.

231. *But see* Kelo v. City of New London, 843 A.2d 500, 544 (Conn. 2004).

232. *See supra* notes 135–36, 140–41, 169–71 and accompanying text.

tity to develop such property, it is essential that the public receive direct benefits. When public use is defined to include almost anything, as it is under the *Kelo* decision, a public benefit cannot be guaranteed. Without a sufficient public use, takings have potential to abuse property rights of individual citizens.

Cities, states, and counties need guidance when they partake in public-private ventures. Courts cannot abandon their constitutional duties and give legislatures the near-exclusive power to determine what constitutes a public use. Public use in TIF takings needs to be set at a narrower and stricter standard—at TIF's original function and intent. Only then can TIF be justified as a valid and essential public financing method.